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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

SALESFORCE.COM, INC., a Delaware  
Corporation,

Plaintiff,

v.

THE COMPUTER MERCHANT, LTD, a  
Massachusetts Corporation,

Defendant.

Case No.: C 07 3556 WHA

JOINT CASE MANAGEMENT CONFERENCE  
STATEMENT

F.R.C.P. 16 and Civil L.R. 16-10

Date: October 18, 2007

Time: 11:00 a.m.

Place: Courtroom 9, 19th Floor

Judge: Honorable William Alsup

AND RELATED COUNTERCLAIMS

Plaintiff and Counter-Defendant salesforce.com, inc. ("SFDC"), Defendant,  
Counterclaimant and Counter-Defendant The Computer Merchant, Ltd. ("TCML"), and Counter-  
Defendant and Counterclaimant Astadia Consulting, LLC ("Astadia") jointly submit this Case  
Management Statement in advance of the October 18, 2007 Case Management Conference.

**1. Jurisdiction and Service**

The Court has subject matter jurisdiction over the claims alleged in this action under 28  
U.S. Code §1332, in that the matter in controversy exceeds the sum of \$75,000 and is between citizens  
of different states. No issues exist regarding personal jurisdiction. Venue is proper pursuant to forum

1 selection clauses contained in written contracts between SFDC and TCML, as well as between TCML  
2 and Astadia. However, TCML is considering a motion to change venue to the District of Massachusetts  
3 on convenience grounds under 28 U.S.C. §1404(a) and/or based on alleged fraud in the inducement to  
4 those contracts that occurred there.

## 5 **2. Facts**

6 SFDC offers the use of an on-demand Customer Relationship Management (“CRM”)  
7 software application that it hosts on its computer servers. Through SFDC’s “AppExchange,” both  
8 SFDC and third-party application developers offer additional software applications that can be installed  
9 in a customer’s account with SFDC. TCML is a staffing firm specializing in the placement of  
10 Information Technology consultants in temporary and permanent job assignments. Astadia provides  
11 consulting and software programming services for the deployment, implementation, and customization  
12 of “software as a service” technology solutions, including SFDC’s application (the “Software”).

13 Beginning in or about November, 2005, TCML inquired of SFDC as to the possibility of  
14 purchasing SFDC’s services to meet certain of TCML’s operating software needs. The parties thereafter  
15 communicated by phone and email and met at TCML’s offices in Massachusetts, where both SFDC and,  
16 ultimately, its recommended integrator Astadia, sought to sell their services to TCML. TCML provided  
17 certain information to SFDC, and to Astadia, regarding TCML’s needs. SFDC conducted a  
18 demonstration of what its service could do for TCML that TCML contends showed TCML what it  
19 needed to see but was materially misleading. SFDC and Astadia deny this. The parties dispute the  
20 content and accuracy of what was said in these discussions and presentations.

21 Thereafter, on May 31 and June 1, 2006, SFDC and TCML entered into contracts by  
22 which SFDC agreed to make its application available to TCML on a three-year subscription basis, for  
23 which TCML agreed to pay a total fee of \$703,625.00, plus tax, with each year’s fee due and payable  
24 annually in advance. Astadia (through its predecessor, GrowthCircle LLC) and TCML entered into a  
25 Professional Services Agreement, effective June 9, 2007, pursuant to which Astadia agreed to provide  
26 implementation, integration and customization services to TCML in connection with TCML’s use of  
27 SFDC’s CRM application.

1 In February, 2007, TCML decided to terminate Astadia's implementation effort. TCML  
2 asserts it made this decision because the SFDC application did not deliver, and never would be able to  
3 deliver, the functionality as demonstrated and represented by SFDC and Astadia, at least not without  
4 what TCML considered to be a software creation effort, as distinct from the simple repurposing and  
5 reconfiguration it expected, with increased risk of failure and increased and ongoing costs. Astadia and  
6 SFDC disagree with TCML's assertions. According to Astadia and SFDC, the required functionality  
7 would have been delivered had TCML allowed Astadia and/or SFDC to complete the project, and any  
8 question about the level of customization needed stemmed from TCML's failure to specify all of its  
9 requirements at the project's inception.

10 TCML paid the first year's subscription fee to SFDC, but has refused to pay the second  
11 year fee and has repudiated any obligation to pay the third year fee. SFDC contends that the contractual  
12 fee is \$244,518.75 (including tax) per year. As a result, SFDC's claims for two years of subscription  
13 fees totals 489,037.50. SFDC filed this action to recover that amount, plus interest. SFDC's complaint  
14 alleges a breach of contract claim and two common counts.

15 TCML denies that it owes any further amounts under its contract with SFDC, and by way  
16 of counterclaim seeks to recover \$288,133.01 that it alleges it paid to SFDC in upfront subscription fees.  
17 TCML also alleges that it incurred additional implementation expenses, including hardware costs and  
18 consulting fees to Astadia, for which it also seeks recovery. TCML has not yet ascertained these costs.  
19 TCML alleges claims for fraud, breach of express warranty, breach of implied warranty, breach of  
20 contract, breach of the covenant of good faith and fair dealing, and violation of the unfair competition  
21 law against SFDC. TCML's claims against Astadia mirror those it pleads against SFDC, except it does  
22 not allege a breach of implied warranty claim against Astadia.

23 Astadia provided professional services for which it contends that it has invoiced TCML  
24 in the amount of \$184,318.06, which invoices TCML has declined to pay. In its counterclaim against  
25 TCML, Astadia seeks to recover these unpaid fees. Astadia pleads a claim for breach of contract and  
26 two common counts.

27 The principal disputed factual issues the parties have identified to date are: (1) the nature  
28 and content of any demonstrations of, or representations about, the functionality of the SFDC

1 application and related software; (2) whether either SFDC or Astadia ever represented that the TCML  
2 technology solution would require only minor configuration and repurposing; (3) whether the SFDC  
3 application did or could deliver the functionality as demonstrated and represented by SFDC and Astadia;  
4 (4) whether the SFDC application did or could deliver the functionality as specified by TCML;  
5 (5) whether and to what extent TCML fully and timely identified its business software requirements to  
6 SFDC and Astadia; (6) the amount of the Astadia invoices that TCML has paid and declined to pay.

### 7 **3. Legal Issues**

8 To date, the parties have focused on the factual disputes underlying their claims, and are  
9 in the process of complying with their respective voluntary disclosure obligations. They therefore have  
10 not yet compiled, and feel they cannot yet compile, a detailed list of legal issues with supporting  
11 authority. With that limitation in mind, one or more of the parties presently contemplate that the court  
12 may be called upon to apply legal rules governing one or more of the following: fraud in the  
13 inducement; the parol evidence rule; contractual limitation of remedy provisions; and contractual choice  
14 of forum and choice of law provisions.

### 15 **4. Motions**

16 No motions have been made to date, nor are any pending. All parties anticipate motions  
17 for summary judgment, either as to the entire action or particular claims or defenses. In addition, as  
18 previously mentioned, TCML is considering a motion to change venue.

### 19 **5. Amendments of Pleadings.**

20 The parties do not currently anticipate any amendments to the pleadings, and propose a  
21 deadline of March 15, 2008 (after initial discovery can be conducted) for filing any motion(s) to amend.

### 22 **6. Evidence Preservation**

23 SFDC has confirmed that no automatic document deletion or destruction program applies  
24 to individuals involved in the transaction with TCML. SFDC also has confirmed that backup tapes that  
25 could include relevant documents are excluded from further backup rotation. In addition, SFDC has  
26 communicated in writing to individuals involved in the TCML transaction, instructing them to retain all  
27 communications (both internal and external) and documents that they have regarding TCML, and not to  
28 destroy any materials that relate to TCML.

1 TCML understands that none of the Software or customization work at issue was done on  
2 its own computer systems. Accordingly, the only electronic documents TCML possesses that are  
3 potentially relevant to the issues in this action are records relating to documents, contracts, and other  
4 communications transmitted between the parties, and data constituting its old software systems and their  
5 functionality, which TCML contends it showed SFDC and Astadia in connection with explaining its  
6 needs. TCML has taken measures to preserve those systems. TCML has determined that its ordinary  
7 and customary document maintenance procedures will not over-write, dispose of, or otherwise destroy  
8 any of the above-described evidence. TCML has transitioned email systems, but its old email system  
9 data has been preserved and the new system data is not being destroyed pursuant to a document  
10 maintenance program or other routine practice. TCML has segregated its old data and systems and has  
11 instructed all relevant employees to maintain potentially relevant material. TCML is in the process of  
12 identifying all potentially relevant communications for production. If and when additional facts are  
13 sought to be discovered or asserted to be relevant by other parties, TCML will undertake to ensure the  
14 preservation of that material.

15 Astadia has caused the file for TCML to be retrieved from the Growth Circle server and  
16 to be preserved. Astadia has instructed all relevant employees not to delete any e-mails or related  
17 electronic files relevant to this dispute and confirmed that no automatic destruction or deletion of the  
18 files will remove any existing electronic files.

## 19 7. Disclosures

20 The parties have complied with the requirements of Fed. R. Civ. P. 26(a)(1)(B) by  
21 identifying individuals with discoverable information, describing by category and location documents  
22 that may be used to support a party's claims or defenses, and providing a computation of damages  
23 claimed. The parties are in the process of preparing their exchange of copies of supporting documents,  
24 which they have agreed will be produced as "TIF" images, together with a "load file" for use in CT  
25 Summation, or such other format as may reasonably be requested including but not limited to PDF. The  
26 parties have reserved their right to view the originals and to receive all electronic and/or magnetic data  
27 in its native format.

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**8. Discovery**

The parties have not taken any discovery to date. The parties anticipate the following discovery:

(a) The parties will complete the exchange of documents pursuant to their initial disclosure obligations.

(b) Follow-up requests for documents, if and as necessary.

(c) An initial wave of depositions, which would include approximately three witnesses from TCML, approximately two witnesses from SFDC, and approximately two witnesses from Astadia.

(d) If the matter cannot be resolved based on the discovery listed above, the parties anticipate that an additional currently unknown number depositions of fact witnesses would be required to prepare the matter for trial. The parties anticipate this additional number would not exceed 10.

**9. Class Actions**

Not applicable.

**10. Related Cases**

There are no related cases.

**11. Relief**

SFDC seeks recovery of the unpaid balance of TCML's three-year subscription. SFDC contends this amount, which is based on the terms of the contract between SFDC and TCML, totals \$489,037.50 (including tax), plus interest at the legal rate from and after the date on which each payment was due.

TCML seeks recovery of all fees it has paid in connection with its agreements with SFDC and Astadia, the voiding of the contracts at issue, and consequential damages in the form of lost time and labor investment by TCML.

Astadia seeks recovery of \$184,318.06, plus interest, the amount it contends are reflected on outstanding invoices sent to TCML.

**12. Settlement and ADR**

The parties have informally discussed settlement and exchanged settlement proposals, but were not able to reach agreement. They have stipulated to mediation as their ADR option, and have

1 complied with the requirements of ADR Local Rule 3-5. The parties have agreed that they need to  
2 conduct key discovery before the mediation, in order to make mediation productive, and that such  
3 discovery includes completing the exchange of documents and conducting depositions of three to five  
4 percipient witnesses.

### 5 **13. Consent to Magistrate Judge For All Purposes**

6 None of the parties consent to having the case assigned to a Magistrate Judge for all  
7 further proceedings.

### 8 **14. Other References**

9 The parties agree that the case is not suitable for binding arbitration or a special master.  
10 This case is also not suitable for reference to the Judicial Panel on Multidistrict Litigation.

### 11 **15. Narrowing of Issues**

12 The parties are not aware of any issues that can be narrowed by agreement at this time. If  
13 not resolved through mediation, the parties contemplate that motions for summary judgment will be  
14 filed and, if not completely dispositive, may narrow the issues for trial. The parties have not yet had any  
15 discussions about trial and therefore not prepared to provide suggestions to expedite presentation of trial  
16 evidence. At this time, it does not appear feasible or desirable to bifurcate issues for trial, but the parties  
17 will further consider that issue after the Court rules on any summary judgment motions.

### 18 **16. Expedited Schedule**

19 This case is not appropriate for handling on an expedited basis with streamlined  
20 procedures.

### 21 **17. Scheduling**

22 The parties propose the following case schedule:

23 Trial: September 22, 2008.

24 Non Expert discovery cut-off: May 30, 2008.

25 Expert designation and reports due: May 30, 2008. Opposition reports due  
26 fourteen calendar days thereafter and reply reports seven days after opposition reports. Expert discovery  
27 cutoff fourteen days after deadline for reply reports.

28 Dispositive Motion filing deadline: July 3, 2008.





1 DATED: October 11, 2007

GALLO & ASSOCIATES

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3 By: \_\_\_\_\_/S/  
4 RAY E. GALLO  
5 Attorneys for Defendant  
6 and Counterclaimant  
7 THE COMPUTER MERCHANT, LTD.  
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